

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that the Board should decide the issue concerning apportionment of benefits between decedent's mother and father, should that issue be reached, rather than remand that issue to the ALJ as had been requested in the brief of Mrs. Hayes.

ISSUES

The ALJ found that Carlie was the daughter of the decedent and that Mrs. Hayes was neither partially nor wholly dependent upon the deceased. Accordingly, decedent left no dependents as that term is defined by K.S.A. 44-508(c), and a payment of \$25,000 shall be made to his legal heirs pursuant to K.S.A. 44-510b. The ALJ found that Carlie is decedent's sole legal heir and found that she is entitled to a payment of \$25,000 from the respondent and its insurance carrier. The ALJ ordered respondent and its insurance carrier to withhold payment of the \$25,000 until further order of the court and asked that counsel for Carlie and counsel for respondent confer and suggest a method for distribution of the funds that would comply with K.S.A. 59-3055.

The ALJ also denied the request by Carlie that Mrs. Hayes be ordered to pay a court reporter's appearance fee for a deposition scheduled by Carlie's attorney of Mrs. Hayes, for which Mrs. Hayes failed to appear.

Mrs. Hayes requests review of all issues found adversely to her, including whether the decedent was survived by any person wholly or partially dependent upon his earnings at the time of the accident and whether Carlie is an heir of the decedent.

Mrs. Hayes argues that the purpose of K.S.A. 44-510b(d) is to provide compensation for the emotional loss suffered by persons not dependent upon the employee. Mrs. Hayes notes that if a life insurance policy provided by an employer pays a death benefit in an amount of \$18,500 to a beneficiary chosen by the employee, there is no workers compensation death benefit when there is no dependent person surviving. The named beneficiary is not required to be an heir under the Kansas probate code.

Mrs. Hayes also points out that the Workers Compensation Act is whole and complete within itself. K.S.A. 44-508(c)(3) defines a "wholly dependent child or children" as "[a] birth child . . . except such a child whose relationship to the employee has been severed by adoption . . . ." Mrs. Hayes argues that this language shows the Legislature intended to exclude as "heirs" persons whose relationship has been severed by adoption.

Mrs. Hayes also argues that the Legislature did not create a property right to be inherited when it amended K.S.A. 44-510b. She also contends the \$25,000 death benefit provided for in K.S.A. 44-510b(d) is not a property right because it is specifically not allowed to escheat to the State as other property escheats to the State when there is no legal heir.

Accordingly, Mrs. Hayes argues that Carlie is not the legal heir of the decedent under the Workers Compensation Act and is not entitled to the \$25,000 death benefit.

Mrs. Hayes notes that K.S.A. 44-510b(d) did not specify a method of apportioning the \$25,000 death benefit among heirs of deceased workers. She argues that although

the Workers Compensation Act is complete within itself, the Act applies other provisions of Kansas law. She requests that the Board apply K.S.A. 60-1905, which deals with civil actions for wrongful death in making provision for the apportionment of the net amount recovered for wrongful death among the known heirs having an interest. That statute provides in part:

The apportionment shall be in proportion to the loss sustained by each of the heirs, and all heirs known to have sustained a loss shall share in such apportionment, regardless of whether they joined or intervened in the action; but in the absence of fraud, no person who failed to join or intervene in the action may claim any error in such apportionment after the order shall have been entered and the funds distributed pursuant thereto.

Mrs. Hayes next states that the Legislature intends to provide fairness and justice with its actions. She contends that the equities and intent of the Legislature is that the person or persons suffering the greatest loss should receive the greatest compensation. She points out that decedent's father has not participated in this workers compensation action, despite being given notice of the claim. She also notes that Carlie never knew the decedent, and Carlie's relationship with him was severed by her adoption.

The minor child, Carlie, argues that Kansas has a strong public policy of allowing children to inherit from their biological parents regardless of termination, relinquishment, or adoption. She contends that if the Legislature wanted to go against this policy when it amended K.S.A. 44-510b(d), it could have done so. Carlie asserts that there is no evidence that Mrs. Hayes was wholly or partially dependent on the decedent. Nor was there evidence that the decedent contributed or intended to contribute more to his mother than an amount needed for his own support. Carlie also contends that there is no evidence that Mrs. Hayes was left with unpaid bills or expenses of her deceased son, other than possible funeral expenses. Decedent's biological daughter, Carlie, is his only legal heir. Accordingly, Carlie requests that the Board affirm the ALJ's decision awarding her the death benefit pursuant to K.S.A. 44-510b(d).

Carlie further requests that the Board find Mrs. Hayes responsible for a \$40 appearance fee for a deposition cancelled by Mrs. Hayes at the last minute without notifying the court reporter. In the alternative, Carlie requests that this fee be paid by the respondent and its insurance carrier.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Decedent was 19 years of age on June 29, 2001, when he was injured in a work-related accident while working for respondent. He died a few days later of complications from his injury. Decedent had completed one year of college and was working for respondent in a summer job.

This matter is before the Board a second time. During the original claim, Mrs. Hayes made a claim for the \$25,000 death benefit pursuant to K.S.A. 44-510b(d). At her deposition of April 17, 2002, Mrs. Hayes testified that she was not dependent upon the decedent.

Q. (by Mrs. Hayes' attorney) Okay. Now, to your knowledge were there any people that were wholly or partially dependent on Darrell's summer earnings at the time of his death?

A. No, we just were a family that's all.<sup>1</sup>

Q. (by Mrs. Hayes' attorney) Am I correct in stating that whatever money Darrell earned while working at Brown and Brown during the summer of 2001 he used for his own expenses for school or living or whatever?

A. Yeah. He was buying a car.<sup>2</sup>

At her deposition in April 2002 and in the Regular Hearing on September 12, 2002, Mrs. Hayes testified that her son had fathered a child, Carlie, when he was 15 years old. Carlie had been adopted shortly after birth. Mrs. Hayes identified the biological mother of the child, the minor child's name, and the year the child was born.

The ALJ ordered that Mrs. Hayes was entitled to 50 percent of the death benefit and that decedent's father, Darrell Smith, Sr., was entitled to the other 50 percent of the death benefit. Mrs. Hayes appealed, requesting that the Board find that she was entitled to the entire death benefit. The Board, in its Order dated March 26, 2003, remanded the case back to the ALJ with directions that a guardian ad litem be appointed to represent the decedent's minor child and to give the decedent's father notice of all proceedings and orders. The ALJ was ordered to provide an opportunity for Mrs. Hayes, Mr. Darrell Smith, Sr., and the minor child to present evidence and argument in support of their positions.

Mrs. Hayes testified again in a deposition on April 20, 2005, and at the Regular Hearing held January 26, 2006. She stated that she had worked as a computer technician until her health began to fail. In April 2001, she started missing a lot of work, and finally in mid-June 2001, she terminated her employment because of her health problems. She

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<sup>1</sup> Hayes Depo. (Apr. 17, 2002) at 8.

<sup>2</sup> *Id.* at 9.

began receiving Aid to Families with Dependent Children (AFDC) and food stamps in May 2001. However, the funds she received from AFDC did not even cover her rent payment. She was married at that time, but she and her husband were not living together, and she did not receive any support from him. Each of her three children had jobs, and each of them contributed part of their paycheck to the household. Mrs. Hayes stated that decedent gave her \$150 out of his June 13, 2001, and June 20, 2001, paychecks while he worked for respondent. Both of Mrs. Hayes' surviving sons testified that the decedent gave Mrs. Hayes \$150 out of his weekly paychecks in June 2001. They also testified that they each gave their mother \$50 every two weeks.

Mrs. Hayes testified as to the amount of her monthly rent payments and other bills. When she was asked whether she was dependent on the \$150 a week she received from the decedent, she stated: "I wasn't depending on it. I wasn't depending on it. It was a family thing. We depended on each other in that home."<sup>3</sup>

K.S.A. 44-510b(c) states:

If an employee does not leave any dependents who were wholly dependent upon the employee's earnings at the time of the accident but leaves dependents, other than a spouse or children, in part dependent on the employee's earnings, such percentage of a sum equal to three times the employee's average yearly earnings but not exceeding \$18,500 but not less than \$2,500, as such employee's average annual contributions which the employee made to the support of such dependents during the two years preceding the date of the accident, bears to the employee's average yearly earnings during the contemporaneous two-year period, shall be paid in compensation to such dependents, in weekly payments as provided in subsection (a), not to exceed \$18,500 to all such dependents.

The record fails to establish that decedent's contributions to his mother exceeded the value of his personal living expenses as a part of that household. Accordingly, the Board finds that Mrs. Hayes was neither wholly nor partially dependent upon her son, Darrell Smith.

Mrs. Hayes again testified concerning decedent's minor child.

Q. (by attorney for Carlie) Do you recall saying that Darrell had a daughter that was given up for adoption?

A. Yes.

Q. And it was your understanding that that was Darrell's daughter?

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<sup>3</sup> Hayes Depo. (Apr. 20, 2005) at 12-13.

A. Yes.

Q. Did you have reason to believe it wasn't Darrell's daughter?

A. No, I didn't have no reason to believe that.<sup>4</sup>

Carlie's attorney introduced into evidence a Relinquishment of Minor Child to Agency signed by the decedent on December 17, 1997, giving up all custody and other parental rights to a child born on December 16, 1997.<sup>5</sup> At the time decedent signed the relinquishment, he was 15 years of age. He acknowledged that he had legal advice from an attorney who did not represent the adoption agency.

K.S.A. 44-510b(d) states:

If an employee does not leave any dependents, either wholly or partially dependent upon the employee, a lump-sum payment of \$25,000 shall be made to the legal heirs of such employee in accordance with Kansas law. However under no circumstances shall such payment escheat to the state. Notwithstanding the provisions of this subsection, no such payment shall be required if the employer has procured a life insurance policy, with beneficiaries designated by the employee, providing coverage in an amount not less than \$18,500.

The Board finds that Carlie is the child of the decedent, Darrell Smith, and is his sole legal heir. The relinquishment of decedent's parental rights by reason of the legal adoption of Carlie does not affect her status as his heir.<sup>6</sup>

The \$40 reporter's appearance fee for a deposition cancelled by Mrs. Hayes at the last minute without notifying the court reporter shall be included in the costs to be paid by the respondent and its insurance carrier.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated April 24, 2006, is modified as to assessment of the \$40 court reporter's appearance fee but is otherwise affirmed.

**IT IS SO ORDERED.**

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<sup>4</sup> R.H. Trans. (Jan. 26, 2006) at 46.

<sup>5</sup> *Id.*, Cl. Ex. 9 at 1.

<sup>6</sup> See K.S.A. 38-1583(f), K.S.A. 44-508(c)(2), K.S.A. 59-506, K.S.A. 59-2118, K.S.A. 59-2124, and K.S.A. 59-2136.

Dated this \_\_\_\_\_ day of July, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Faith Hayes  
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Bryce D. Benedict, Administrative Law Judge  
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